No. 97-836

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Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER NORTH CAROLINA

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REPLY BRIEF FOR PETITIONER NORTH CAROLINA

The brief of the federal government in opposition is remarkable in a number of respects. The government's arguments do not defend the court of appeals decision and do not address this Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) ("*PUD No. 1*"). Rather, the government argues that this Court should accept the decision below on an alternative legal theory, which was abandoned by the Federal Energy Regulatory Commission ("FERC") and rejected by the court of appeals.[1] The government concedes the comprehensive and

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[1] While intervenor Virginia Beach and *amicus* Commonwealth of Virginia pay lip service to the court of appeals decision, they too oppose certiorari on grounds unrelated to the decision below.

sweeping scope of the state certification authority that the Petition asks this Court to restore, but argues that the impact of the exception created in this case is too limited to require correction. In so arguing, however, the government ignores the fact that 21 States have filed an *amicus* brief in support of North Carolina's Petition and that 40 States supported North Carolina below because of the decision's obvious sweeping consequences under the Clean Water Act ("CWA").

ARGUMENT

I. THE GOVERNMENT ALL BUT CONCEDES THAT THE COURT OF APPEALS DECISION IS WRONG

The federal government utterly fails to support or even address the court of appeals' holding that North Carolina had no certification rights under CWA Section 401(a)(1), 33 U.S.C. § 1341(a)(1) ("Section 401(a)(1)"), because the activity authorized by the license amendment would not add a "substance" to the water. Rather, the federal government argues that the result below should not be disturbed because the license amendment approved by FERC will not have a "material adverse impact" on the water quality in the discharge from the Hydro Project. Brief for FERC ("FB") at 15-16.[2] Although FERC relied on that theory in its initial decision (Pet. App. 67a), FERC abandoned that position after the interim remand from the court of appeals, proposing instead the "substance adding test" ultimately adopted by the court of appeals (Pet. App. 115a).

The court of appeals not only recognized that FERC had "discarded" its initial position as a basis for its decision, but expressed "serious reservations" about its "legality." Pet. App. 14a-15a.

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[2] This argument is based on a FERC regulation (18 C.F.R. § 4.38(f)(7)(iii)) which purports to permit FERC to waive the statutory certification requirement when it finds that a license amendment will not have a material adverse impact on the discharge.

The government has offered no basis for avoiding the important issue of law raised by the decision below -- the correctness of the court of appeals' holding that state certification of license amendments is required only when there is an "addition . . . of a substance" to water. Pet. App. 17a. Moreover, both the decision of the court of appeals and the position of the government are inconsistent with the position of the Environmental Protection Agency ("EPA"), the agency charged with administering the CWA.[3]

II. THE GOVERNMENT'S CLAIM THAT THE DECISION BELOW "CAN BE EXPECTED TO HAVE A VERY LIMITED IMPACT ON STATE CERTIFICATION AUTHORITY" IS PATENTLY SPECIOUS

The government argues that the reach of the decision below is likely to be limited because most hydroelectric projects are situated entirely within one State and the circumstances of multi-state involvement under the CWA will be rare. FB at 13-14. This suggestion is unfounded. The rule of law articulated by the court of appeals is not limited to multi-state hydroelectric projects. Moreover, the dam and all FERC-authorized hydroelectric facilities in this case *are* located entirely within one State -- North Carolina. The only pertinent activity occurring in Virginia is the construction of an intake facility 300 yards from the North Carolina border designed to draw water from the impoundment in North Carolina created by the dam.

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[3] EPA initially advised the court below that it was "unquestionable" that Section 401(a)(1) applied to the instant license amendment and that North Carolina had certification rights with respect thereto. App. 5a. Even after the filing of the United States' *amicus* brief below, EPA continued to urge that it is "essential" that license amendments be subject to the CWA "to ensure that amendments to federal licenses or permits are not used as a mechanism to avoid State certification of changes to federally-licensed activities." App. 11a.

What concerns North Carolina and the *amici* States is the broad notion that FERC can, through license amendments, authorize changes in the operation of hydroelectric facilities and modify the flow of waters in a State without allowing that State to determine whether the altered discharge is consistent with State water quality requirements.[4] This concern is not limited to water withdrawal projects. There are many other types of activities requiring license amendments (such as changes to the operating parameters of power generation facilities) which are implicated by the court of appeals' far-reaching decision and which have critical impacts on water quality.[5] *See* Brief for *Amici Curiae* States of Oklahoma, *et al.* at 5.

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[4] The Commonwealth of Virginia incorrectly attempts to characterize this case as a pitched battle between two States, arguing that North Carolina is attempting to "invalidate" the certification issued by Virginia in connection with the Corps of Engineers ("COE") permit authorizing construction of Virginia Beach's intake facility and pipeline. Amicus Curiae Brief of the Commonwealth of Virginia ("VB") at 6, 1. Nothing could be further from the truth. North Carolina does not seek to invalidate Virginia's certification; it merely seeks to enforce its own certification rights triggered by the discharge over the dam in North Carolina. As North Carolina has repeatedly made plain, its concern is with the federal usurpation of North Carolina's certification authority.

[5] Virginia Beach's argument that reversing the decision below will create a nightmare scenario of multi-state certification requirements (Brief for the City of Virginia Beach at 13) is a red herring. North Carolina is not a remote downstream State seeking certification rights relative to modification of a hydroelectric facility in an upstream State. What is at issue in this case is North Carolina's Section 401(a)(1) rights relative to a withdrawal of water directly from a lake created by a hydroelectric dam in North Carolina. It is legally irrelevant that the intake structure is built 300 yards north of the border in a small, tidal tributary which, were it isolated from Lake Gaston, would contain only a minute fraction of the water being withdrawn.

Hydroelectric licenses typically have long terms, here 50 years. Many are amended during their term. Contrary to the government's suggestion, the States are plainly not protected by their ability to impose conditions in licensing and relicensing proceedings. Unless a State has perfect prescience at the time of licensing as to all potential amendments that might be proposed, it is powerless, under the decision below, to avail itself of any of the protections intended by Section 401(a)(1) during the long period of the license. For this reason, the government's correct assertion (FB at 15) that a State-imposed condition may not be modified without State consent is irrelevant.

III. THE GOVERNMENT'S CLAIM THAT THE COURT OF APPEALS DECISION DOES NOT CONTRADICT GOVERNING PRECEDENT IS ERRONEOUS

Aside from an introductory statement that the lower court's decision "does not conflict with any decision of this Court" (FB at 11), the government never makes any argument of its own addressing the conflict between the decision below and this Court's decision in *PUD No. 1*. Virginia Beach attempts to do so but misstates North Carolina's reliance on *PUD No. 1*. Brief for the City of Virginia Beach ("VBB") at 17-19.

North Carolina has never contended that *PUD No. 1* directly addresses whether a State has Section 401(a)(1) certification rights only if a "substance" is added to an existing discharge. North Carolina contends that the holding in *PUD No. 1* is predicated on the fact that the discharge of water from a hydroelectric dam is a "discharge" within the meaning of Section 401(a)(1). Petition at 14-16. Virginia Beach (like the court of appeals) concedes that additions in flow affecting a discharge trigger certification rights, but argues that *PUD No. 1* stands for the proposition that reductions in flow do not because reductions in flow are not themselves discharges.

VBB at 17-18. North Carolina's point is that *PUD No. 1* explicitly states that *reductions* in flow can affect water quality in the same way as *additions* to flow. Therefore, just as additions of water to an existing hydroelectric discharge trigger certification rights, so must reductions.

The government does address the conflict with *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109 (4th Cir. 1989) (FB at 12-13), as does Virginia Beach (VBB at 14-15). Here too, the response is ineffective. The government characterizes *Fredericksburg* as a narrow decision upholding a FERC regulation requiring that an applicant request certification from a State using the State's designated procedures. What the government ignores is that the regulation would not have been at issue had the State not had Section 401(a)(1) certification rights. Thus, the Fourth Circuit's holding was predicated upon the existence of certification rights in a case analogous to this case, where there was a *reduction* in flow over an existing dam. Virginia Beach's claim that *Fredericksburg* "does not even identify the discharges that triggered the certification requirement" (VBB at 14) is disingenuous; the court made clear, 876 F.2d at 1111, that it was the alteration in flow over the existing dam which gave rise to the certification requirement.[6]

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[6] Virginia Beach's arguments that North Carolina is barred from exercising its certification rights by the doctrines of *res judicata* and collateral estoppel because North Carolina did not raise the certification issue in proceedings before the Secretary of Commerce (VBB at 22-24) are not before this Court because they were not raised below. The argument that was raised below -- that North Carolina waived its Section 401(a)(1) rights in proceedings before the COE -- was properly rejected by the court of appeals. Pet. App. 12a-13a.

IV. THERE IS NO BASIS FOR THE GOVERNMENT'S ATTEMPT TO CARVE A NARROW EXCEPTION OUT OF THE CLEAN WATER ACT'S STATE CERTIFICATION REQUIREMENT

The government candidly concedes the comprehensive nature and broad reach of Section 401(a)(1), but argues that the narrow exception found by the court of appeals should remain unreviewed. The government acknowledges that (i) Section 401(a)(1) certification is required in *all* hydroelectric project licensing and relicensing proceedings, because the flow of water over the dam results in a discharge; (ii) States can impose conditions at licensing and relicensing that may not be modified by a subsequent license amendment and thus may effectively protect against subsequent water withdrawals; (iii) States have certification rights under FERC's regulation whenever FERC decides that a license amendment will have a material adverse impact; (iv) Section 401(a)(1) certifications are required for EPA permits and permit amendments, including "activities that would result in a volume reduction of preexisting discharges"; and (v) even "downstream" States are protected under Section 401(a)(2) of the CWA.[7] FB at 13-17. Virginia Beach makes essentially the same concessions.[8]

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[7] The government, Virginia Beach and Virginia all note that North Carolina sought assistance from EPA under Section 401(a)(2) during the COE proceeding which resulted in the issuance of a dredge and fill permit authorizing the construction of the intake structure in Virginia. FB at 16; VBB at 22; VB at 12. These parties are correct that for the purposes of that proceeding, North Carolina was indeed a downstream State whose only remedy was under Section 401(a)(2). The circumstances are entirely different in the FERC proceeding, which authorizes an activity which involves a discharge *in*, not upstream of, North Carolina.

[8] Virginia Beach affirms that (i) "water withdrawal projects do and will continue to require State certification"; (ii) construction of intake structures

(Footnote continued)

Having thus conceded that Section 401 applies broadly and generally to the construction and operation of almost any facility or the performance of any activity which might originate or affect the discharge from a hydroelectric project, the essence of the government's (and Virginia Beach's) argument boils down to a simple proposition: the States' virtually uncircumscribed authority under Section 401(a)(1) may be usurped in the "limited" context of FERC license amendments occurring in the interval between licensing and relicensing which are not governed by a preexisting State Section 401(a)(1) certification condition and which *FERC* finds will not have a "material adverse impact" on water quality.

That is not a rational reading of the statute. If States have Section 401(a)(1) certification rights in all of the circumstances cataloged by the government (and Virginia Beach) -- and they do -- they must have those same rights in this case. If, for example, a State has the right to impose minimum flow conditions effectively controlling future water withdrawals at the time of initial licensing and those conditions cannot be abrogated by a *future* license amendment, then the State surely must have the same right in a *future* license amendment proceeding. Similarly, if a State has the right to restrict *future* water withdrawals at relicensing -- when no substances are being added to the water, no additional facilities are being constructed, and no alterations in the discharge are occurring -- then it surely must have that same right during a license amendment proceeding prior to

(Footnote continued)

requires certification; (iii) "any new activity that requires a new federal license or permit, and that affects water quality, will also involve a new discharge and a State certification"; (iv) States can "protect against future *alterations*" via Section 401(d) conditions; (v) "States have ample authority to protect themselves against adverse effects of future *changes* in a certified project"; and (vi) "increased discharge[s] may well" require certification. VBB at 11, 12, 12 n.6, 17 (emphasis in original).

relicensing. Indeed, it is nonsensical to concede that a State may effectively control future withdrawals at the time of licensing and relicensing, but not in the 50-year interval between those events.

CONCLUSION

The government has effectively conceded that the decision below is erroneous and inconsistent with controlling precedent, and has argued unpersuasively that the impact of its limitation on CWA certification rights will be limited. The Court need not look beyond the fact that 40 States supported North Carolina below and 21 States have filed an *amicus* brief in support of North Carolina's Petition to discern the hollowness of the government's contention. This is not (as Virginia Beach suggests (VBB at 11)) a "routine case" unworthy of this Court's attention. The rights at stake here are fundamental rights of each State to assure the quality of the waters within its borders. Arguments that courts can carve out "limited" exceptions to statutes as comprehensive as the CWA, and decisions that draw illogical distinctions between additions and reductions to flow, when both have been

determined by this Court to affect water quality, should not be permitted to stand without review by this Court.

For the foregoing reasons, North Carolina's Petition for a Writ of Certiorari should be granted.

February 2, 1998

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